Supreme Court, U.S.
FILED
MAY 20 1997
CLERK

No. 96-1748

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

HAROLD D. JOHNSON, M.D.,

Petitioner,

V.

GREATER SOUTHEAST COMMUNITY HOSPITAL CORPORATION, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

NICHOLAS STILLWELL McCONNELL
(Counsel of Record)
ARTHUR DAVID BURGER
JACKSON & CAMPBELL, P.C.
1120 20TH STREET, N.W.
SOUTH TOWER
WASHINGTON, D.C. 20036
(202) 457-1600

Attorneys for Respondents

---

6 PP

PARTIES

The parent corporation of respondent Greater Southeast Hospital Corporation is The Greater Southeast Community Hospital Foundation, Inc., a non-profit corporation organized under the laws of the District of Columbia. Respondent hospital has no subsidiaries.

The parties to the case are otherwise correctly identified in the petition, although undersigned counsel do not represent defendant Kurt Darr and, therefore, take no position as to whether he is a respondent.

All respondents otherwise join in this brief in opposition, except Mary Lou Mayers, deceased, for whom a Suggestion of Death was filed in the district court, but for whom no substitution of party was sought by petitioner.

RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the petition for certiorari seeking to review the opinion of the United States Court of Appeals for the District of Columbia Circuit.

STATEMENT OF THE CASE

Petitioner's Statement ignores every fact and development which is not favorable to him, and there are many. The district court's opinions of June 24, 1996, and October 19, 1995, provide an accurate statement of the proceedings. App. 7a-62a. For example, after reciting the principal evidence of the respondent hospital's peer review activity regarding petitioner, the district court, in its June 24, 1996 opinion, found:

> In light of the above, it can hardly be maintained that both the two peer review actions and the related peer review activity were motivated by anything other than a 'reasonable belief that the action was in furtherance of quality health care.' 42 U.S.C. § 11112(a)(1).

App. 20a.

The district court also made a well justified finding that petitioner had improperly failed to oppose some of respondents' motions for summary judgment for over two years, despite express orders for him to do so, and that, as a result, those motions were conceded under U.S. District Court For D.C. Local Rule 108(b). App. 25a-26a; 43a-46a.

On October 9, 1996, the court of appeals granted summary affirmance of the judgment of the district court stating: "The merits of the parties' positions are so clear as to warrant summary action." App. 1a.[1/] On January 31, 1997, the court of appeals denied petitioner's petition for rehearing and suggestion for rehearing *in banc*.[2/]

REASONS FOR DENYING THE WRIT

I. THE SOLE QUESTION PRESENTED FOR REVIEW WAS NOT RAISED BELOW

The sole question presented by petitioner for this Court's consideration is whether "[t]he Health Care Quality Improvement Act of 1986, 42 U.S.C. §§ 11101-11152, alters the burden of proof established in Rule 301 of the Federal Rules of Evidence, as interpreted by this Court in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993)." (Petition at i.)

[1/] Petitioner's appeal of the district court's award of attorneys' fees to defendant Kurt Darr has not yet been resolved by the court of appeals and remains pending in that court. App. 2a. Dr. Darr was the hearing officer for the respondent hospital's internal hearing.

[2/] There are several affirmative misstatements in the petition for certiorari including, among others, the following:

- Petitioner's difficulties did not arise merely out of a concern that he had "a bad attitude." (Petition at 6.) There were significant issues regarding the quality of patient care which were in dispute, as set forth in the district court's June 24, 1996 opinion. App. 17a-20a.

- Respondents never contended that they were "immune" under the Health Care Quality Improvement Act from federal civil rights suits. (Petition at 9 and n. 21.)

Despite the pendency of this case for nearly seven years, petitioner never raised this issue in either the district court or the court of appeals. Petitioner never even cited Rule 301 in any brief filed in this case before filing the petition for certiorari. Respondents have never raised this issue. Nor has either the district court or the court of appeals addressed this issue in any of the opinions rendered in this case.

This Court ordinarily declines to review issues that were not raised in the courts below, and petitioner has presented no basis whatever for an exception to that rule. *City of Springfield, Mass. v. Kibbe*, 480 U.S. 257, *reh. denied*, 481 U.S. 1033, (1987).

II. RESPONDENTS WERE ALSO HELD TO BE ENTITLED TO SUMMARY JUDGMENT ON GROUNDS UNRELATED TO HCQIA IMMUNITY AS A RESULT OF PETITIONER'S FAILURE TO FILE TIMELY RESPONSES

As set forth in the June 24, 1996, and October 19, 1995, opinions of the district court, and as stated above, respondents moved for summary judgment on multiple separate grounds. The immunity provided by the Health Care Quality Improvement Act (HCQIA) was just one of those grounds. The district court held that even if respondents were not entitled to summary judgment under HCQIA, they were entitled to summary judgment on the other, additional grounds set forth in their summary judgment motions which petitioner had failed to oppose for over two years despite express orders from the court that a response was due on a date certain. App. 25a-26a; 43a-46a.

Therefore, even if the district court and the court of appeals erred in granting summary judgment to respondents under HCQIA, respondents nevertheless were entitled to prevail on other grounds.

CONCLUSION

The writ of certiorari should be denied.

Respectfully submitted,

Nicholas Stillwell McConnell
(Counsel of Record)
Arthur David Burger
JACKSON & CAMPBELL, P.C.
1120 20th Street, N.W.
South Tower
Washington, D.C. 20036
(202) 457-1600

May 29, 1997 Attorneys for Respondents